BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, N.W.
WASHINGTON, D. C. 20001-8002

DATE: March 13, 1997
CASE NO: 95-INA-171

In the Matter of:

DEP CORPORATION
Employer,

On Behalf of:

ARNALDO A. HUKOM
Alien

Appearance: DAN E. KORENBERG, ESQ.
for the Employer and the Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien ("Arnoldo A. Hukom") filed by Employer ("Employer") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, denied the application and the Employer requested review pursuant to 20 C.F.R. §656.26.

Under Section 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under

prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On December 24, 1992, Employer filed an application for labor certification to enable the Alien to fill the position of Manager of Programming and Analysis for its Health and Beauty Manufacturing and sales company. The duties of the job offered were described as follows:

> Develop, design, implement and maintain intricate business application programs. Analyze, maintain and upgrade existing computer hard-ware systems. Study existing information processing system, evaluating its capacity to produce desired results with a minimum expenditure of time and resources improving production or workflow as required. Review computer system capabilities, workflow and scheduling limitations to determine if requested program or program change is possible within existing system. Establish extent of programming and coding required and discusses it with management. Assign, coordinate, and review programming personnel's work. Program considering computer storage, peripheral equipment and intended use of output data. Prepare program development charts and manuals, describing installation and operating procedures, and its subsequent revisions. Train employees in programming and program coding. Provide customer training and technical support.

A B.S. in Engineering with a major in Industrial Engineering was required with 5 years experience in the job offered or as a Senior Systems Analyst Programmer. Other special requirements were a knowledge of COBOL and IBM System 38 or AS 400. Must have knowledge of ASI Software, Case Tools and EDI. Must have working knowledge of RPG or IBM AS 400.

Wages were $60,000.00 per year, basic plus time and one-half for overtime (i.e. $60.00 per hr.) AF-51-89).

One referral was received, Ronald D. Miller from the Illinois State Employment Service.

An NOF was issued March 23, 1994, denying labor certification based on the rejection of a qualified U.S. worker, Ronald Miller, due to the unstated requirement of taking a programming test. (AF-47-49).

Employer, April 26, 1994, forwarded a rebuttal. Employer stated:

> We also specified as other special requirements in Item #15 of ETA 750 Part A that applicant must have knowledge of COBOL and IBM System 38 or AS400. Must have knowledge of ASI Software, Case Tools and EDL. Must have working knowledge of RPG on IBM AS400.
>
> In response to our advertising for this position, applicant Ronald D. Miller submitted a resume which indicates that he has absolutely no knowledge of ASI Package. Our company mainly utilizes ASI software which the applicant has no experience working with. The ASI software is written in AS/400 COBOL, and therefore, requires such skills in order to code, debug, and maintain the software in conformance to ASI's methodology and standard. Since Mr. Miller did not have any knowledge of the required software, we could have disqualified him based on his record. Nevertheless, in our good faith effort to interview him, we invited Mr. Miller for a personal interview which was conducted on December 29th, 1993.
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> At the time of the interview, Mr. Miller clearly stated that his skills in COBOL on the AS/400 were not current, that he was not familiar with the Knowledgeware Case Tools, and that he had not programmed in that environment for many years. Mr. Miller told us that he was under the impression that the position he had applied for would not require him to do actual programming. He stated that he would prefer to work with strategic planning for new projects and did not want to be involved in the actual coding aspects of the job. Mr. Miller was invited to take a test, at which time, he was shown an EDI transmission which he erroneously interpreted as an inventory record. This indicated that he is not familiar with the details in implementing EDI. It is obvious that Mr. Miller realized that he could not perform the job duties of this position and he, therefore, voluntarily withdrew himself from the application.
>
> Programming, COBOL on AS/400, ASI software, Case Tools and EDI are stated requirements to per-form the job offered (please see highlighted text portions for reference), and they were clearly stated in the advertising, placed in Los Angeles Times during the recruitment period. The applicant was invited to take a programming test, because programming is inherent to the job offered, and our test is designed to determine whether or not any applicant who applies for a job with our company involving programming has substantive knowledge to do the job. Furthermore, the job duties of the offered position clearly stated that this is a managerial position which not only requires programming skills, but

also directing, and supervising programming personnel in performance of their job duties. This includes assigning, coordinating and reviewing programming personnel's work, and training employees in programming and program coding. A person who trains subordinate programming personnel must have demonstrable abilities and knowledge in performing the duties so that he/she may transfer this knowledge to his/her subordinate staff. The fact that the applicant refused to take the test confirmed our impression that the applicant's programming knowledge was obsolete and that he was not qualified for the offered position.

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989) (en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993).

Section 656.21(b)(6) provides that an employer must show that U.S. applicants were rejected solely for job-related reasons. Employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. H.C. LaMarche Ent., Inc. 87-INA-607 (1988). Where an applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, although the resume does not expressly state that he or she meets all the job requirements, an employer bears the burden of further investigating the applicant's credentials. Gorchev & Gorchev Design, 89-INA-118 (Nov. 29, 1990) (en banc). On the other hand, where the Final Determination does not respond to Employer's arguments or evidence on rebuttal, the matters are deemed to be successfully rebutted and are not in issue before the Board. Barbara Harris, 88-INA-32. April 5, 1989)

We reluctantly find that the Employer has successfully rebutted the CO's NOF and that the reasons given by the CO in its Final Determination in this case are not sufficient. We note, initially that alien has been in Employer's company for approximately 8 years, and that his prior experience probably did not qualify him for his current position. The job description given seemed tailored to alien's acquired training while with Employer. However, the CO did not give these reasons for denial of labor certification and Employer had no opportunity to rebut. Moreover, it would appear that the job opportunity would and should have attracted many more U.S. applicants. While the CO had many probably legitimate grounds for denial, he instead based the entire matter on the one rejected U.S. job applicant.

We find the test here given was designed to determine whether or not an applicant has substantive knowledge of the job and is a part of the interviewing process. In Matter of A to Z Vending Services Corp., 90-INA-14 (January 29, 1993); Mitco, 90-INA-295 (Sept. 11, 1991).

We have quoted extensively from Employer's rebuttal since none of the arguments presented by Employer were addressed by the CO in its Final Determination.

ORDER

For the reasons given, the CO's denial of labor certification must be REVERSED. This matter is remanded for granting of labor certification.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge

JCH/mlc

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.